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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-832

LOUIE F. BAY,

Petitioner,

v.

WESTERN PACIFIC COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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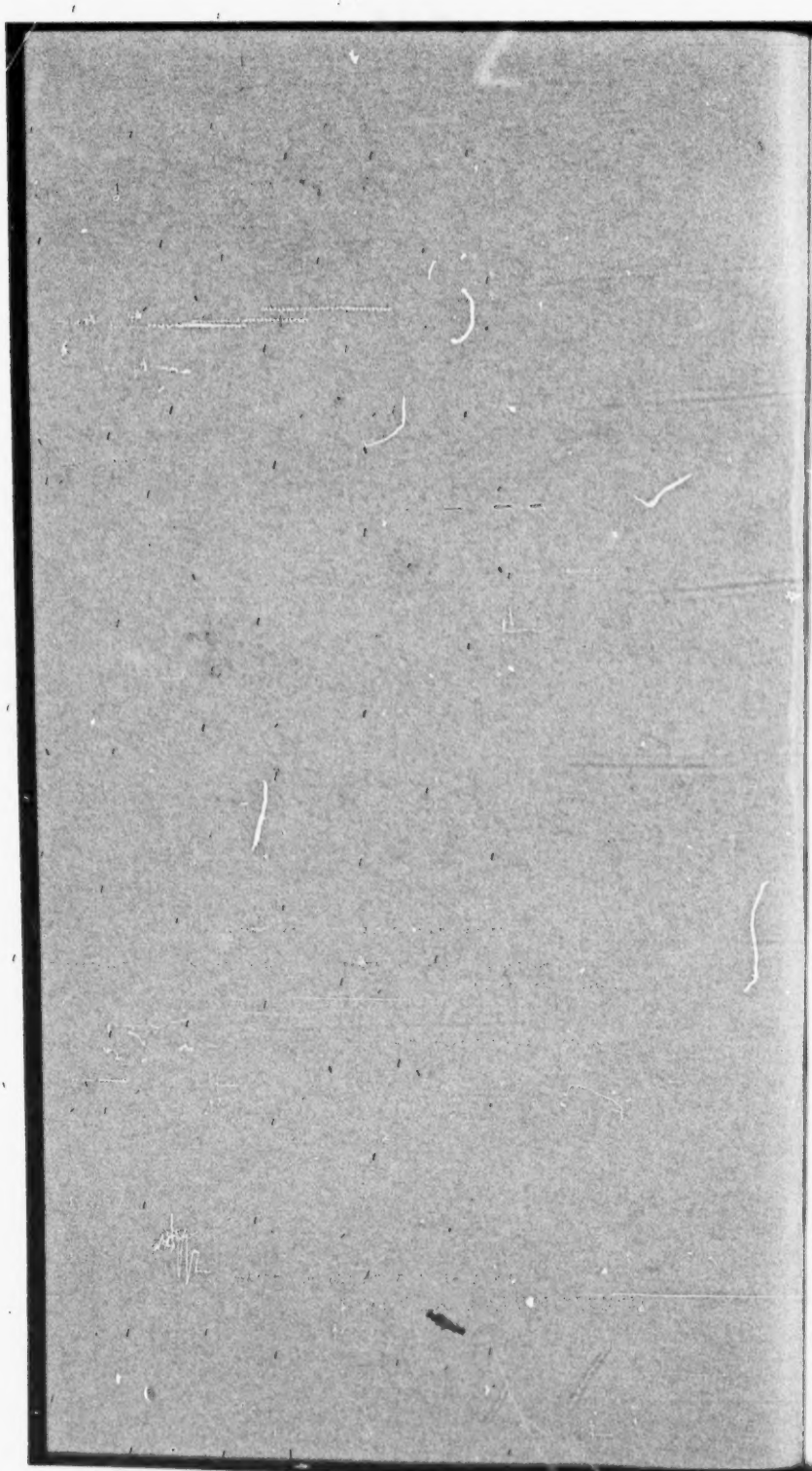

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OPINIONS BELOW

The unreported opinion of the California Court of Appeal, First District, Division Three, is attached to the Petition ("Appendix A" thereto); as is the notification of denial of Petitioner's petition for hearing before the California Supreme Court ("Appendix B" thereto).

JURISDICTION

The petition sets forth the jurisdictional requisites.

QUESTIONS PRESENTED

Where, in an action brought by petitioner employee against respondent employer pursuant to the Federal Employers' Liability Act (45 U.S.C. §§ 51, et seq.), respondent set up an oral release as a defense, the existence and scope of which was bifurcated for prior trial in accordance with state law, and where petitioner had a jury trial on all relevant issues pursuant to applicable state and federal law resulting in a verdict and judgment thereon for respondent which was affirmed by the state appellate court and denied review by the state supreme court, did petitioner receive a full, adequate, and proper trial.

STATUTORY PROVISIONS INVOLVED

1. Federal Employers' Liability Act,

45 U.S.C. §§ 51, et seq. ("FELA"), the text of which is attached to the Petition as "Appendix D".

2. California Code of Civil Procedure Section 597, the text of which is attached to the Petition as "Appendix G".

3. California Code of Civil Procedure Section 1408, the text of which is attached hereto as "Exhibit A".

4. California Evidence Code Section 354, the text of which is attached hereto as "Exhibit B".

5. California Evidence Code Section 780(k), the text of which is attached hereto as "Exhibit C".

STATEMENT OF THE CASE

The statement of the Case in the Petition requires some amplification and correction.

Petitioner's complaint below against respondent alleged that on December 12, 1966,

while employed by respondent, petitioner suffered injuries for which he sought to recover damages. The action was eventually set for trial to commence on October 7, 1970.

Subsequent to the trial setting, and before the October 7, 1970, trial date assigned to the action involved herein, petitioner claimed injuries to his wrist assertedly resulting from an accident while in the employ of respondent on or about July 16, 1970. This latter accident was not made part of the suit involved herein.

When the action involved herein was called for trial on October 7, 1970, respondent and petitioner (with counsel) appeared and while waiting for a court to become available, counsel for petitioner and counsel for respondent entered into settlement negotiations.

After negotiations between the two counsel, and after petitioner and his counsel had conferred outside the presence of respondent's counsel, petitioner's and respondent's

respective counsel agreed on a settlement and release with respect to, at the very least, all of the claims asserted by petitioner in the action involved herein. Thereafter, and by agreement of the respective counsel for the parties, the court was advised of the settlement and this action was taken off the court's calendar.

Thereafter petitioner disavowed the scope of the settlement and release that had been reached to the extent that he claimed that the July 16, 1970, wrist injury was not included in the agreement. Petitioner then had this action restored to the court's civil active list and demanded a jury trial.

After a hearing on respondent's duly noticed motion, the trial court ordered that respondent be granted leave to amend its answer to petitioner's complaint to assert the release as a defense and that respondent be granted leave to file a cross-complaint

against petitioner based on the release. At this particular hearing the trial court also granted respondent's motion to bifurcate the trial of this matter so that the issues relating to the release would be tried before any issues raised in petitioner's complaint. This latter ruling was made in accordance with applicable California law, [1] California Code of Civil Procedure Sections 597 and 1048. Petitioner now apparently concedes that bifurcation was proper (Petition p. 10.)

The action came on regularly for trial before a jury on January 3, 1972, and the bifurcated issues relating to the release agreement were tried first.

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1. Where an action under the Federal Employer's Liability Act is brought in state court, plaintiff is bound by the state's procedural law. Minneapolis & St. L. R.R. v. Bombolis 241 U.S. 211, 218 (1916)

During the course of the trial, contrary to the implication set forth in the first full paragraph on page 8 of the Petition, the attorney who represented petitioner during the settlement negotiations on October 7, 1970, testified as to whether he and petitioner had discussed the July 16, 1970, wrist injury during the settlement negotiations. 2/

During the trial petitioner never sought to prove that the release had been procured as a result of mistake as to the extent of his injuries, fraud, undue influence, duress, or any other ground that might constitute a defense to, or avoidance of, the release in question. As to any such issues petitioner had the burden of proof. Callen v. Pennsylvania R. Co., 322 U.S. 625, 630 (1948). Petitioner never tendered any such issues to the trial court, and petitioner failed to make any offer of proof

2. Reporter's Transcript 19:19 - 19:23.

as to such issues. California Evidence Code Section 354(a) requires that such an offer of proof be made at trial before a party can complain of an exclusion of evidence.

Contrary to petitioner's statement (Petition p. 12) that no such offer of proof was necessary due to the trial court's rulings, the trial court expressly and repeatedly offered to petitioner the opportunity to make an offer of proof as to any such matters as might constitute a defense to the release (Reporter's Transcript 16:1-18:6). Not only did petitioner not make such an offer of proof, but in fact petitioner's trial counsel expressly declined to tender such issues to the trial court or make the necessary offer of proof (Reporter's Transcript 18:7).

Given petitioner's failure to raise any defensive matter as to the release, the release agreement involved herein stood on the same

basis as a release entered into by any other non-FELA litigant. [3] Consequently, the only relevant issues to be decided by the jury were whether the objective manifestations of petitioner's and respondent's respective counsel on October 7, 1970, resulted in the formation of the release agreement, [4] and, if so, the nature and extent of that agreement.

As to such issues respondent's counsel, petitioner's counsel at the time of the settlement negotiations, and petitioner testified. Obviously the credibility of such witnesses was crucial. Pursuant to California Evidence Code Section 780(k), petitioner was cross-examined in relation to his credibility, and he testified that he had previously lied while under oath.

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3. See Callen v. Pennsylvania R. Co., supra at 630.

4. Brant v. California Dairies, Inc., 4 Cal.2d 128, 133, 48 P.2d 13 (1935); questioned on other grounds, Brawthen v. H & R Block, Inc., 128 Cal App 3d 131 (1972).

The relevant issues were submitted to the jurors with the direction that they specifically find whether or not petitioner had released any claims on October 7, 1970, and, if so, the exact nature and extent of the claims so released. The jury returned a verdict which specifically found that on October 7, 1970, petitioner agreed to release all of his claims against respondent for injuries occurring before October 7, 1970, [5] and judgment was duly entered on that special verdict (Clerk's Transcript 34-36). Petitioner does not contend that the evidence was insufficient to support the verdict or the judgment entered thereon.

Thereafter petitioner moved the trial court for a new trial, and after proper hearing the motion was denied. Petitioner then appealed the judgment to the California Court of Appeal,

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5. Clerk's Transcript 33.

First District, urging, among others, all of the issues now presented to this Court.[6] After the matter had been fully briefed and argued, the Court of Appeal affirmed the judgment by way of a written opinion (Appendix A to Petition) which fully discussed and disposed of all of the issues which petitioner raised. Petitioner subsequently petitioned the California Supreme Court for a hearing on only a few of the issues he had urged before the Court of Appeal (see petitioner's Petition for Hearing to the California Supreme Court.) The California Supreme Court denied a hearing (Appendix B to Petition).

ARGUMENT

Petitioner received a full, adequate, and proper jury trial in accordance with federal law and with California procedural law on the issues of the existence, nature, and extent of

6. See Appellant'a [petitioner's] Opening Brief in the California Court of Appeal. A copy of Brief and Petition are being lodged with the Court's Clerk.

the release agreement involved -- the only issues properly before the jury due to petitioner's failure at trial to submit any other relevant issues. The judgment was attacked in the trial court and in the California Appellate Courts. The issues now presented to this Court were urged and rejected on the merits by the California Court of Appeal, and the California Supreme Court has refused to review the matter.

Petitioner totally fails to demonstrate how the results herein conflict in any way with any decision -- state or federal -- or with any applicable law. Likewise, petitioner has failed to raise any question of substantial importance before this Court or to present any reason for the exercise of this Court's supervisory powers. In short, petitioner has completely failed to present any matter calling for this Court's review as outlined in the Court's Rule 19.

CONCLUSION

In light of the proceedings had in this matter it is respectfully submitted that certiorari should not be granted.

Dated: JAN 29 1975

Respectfully submitted,

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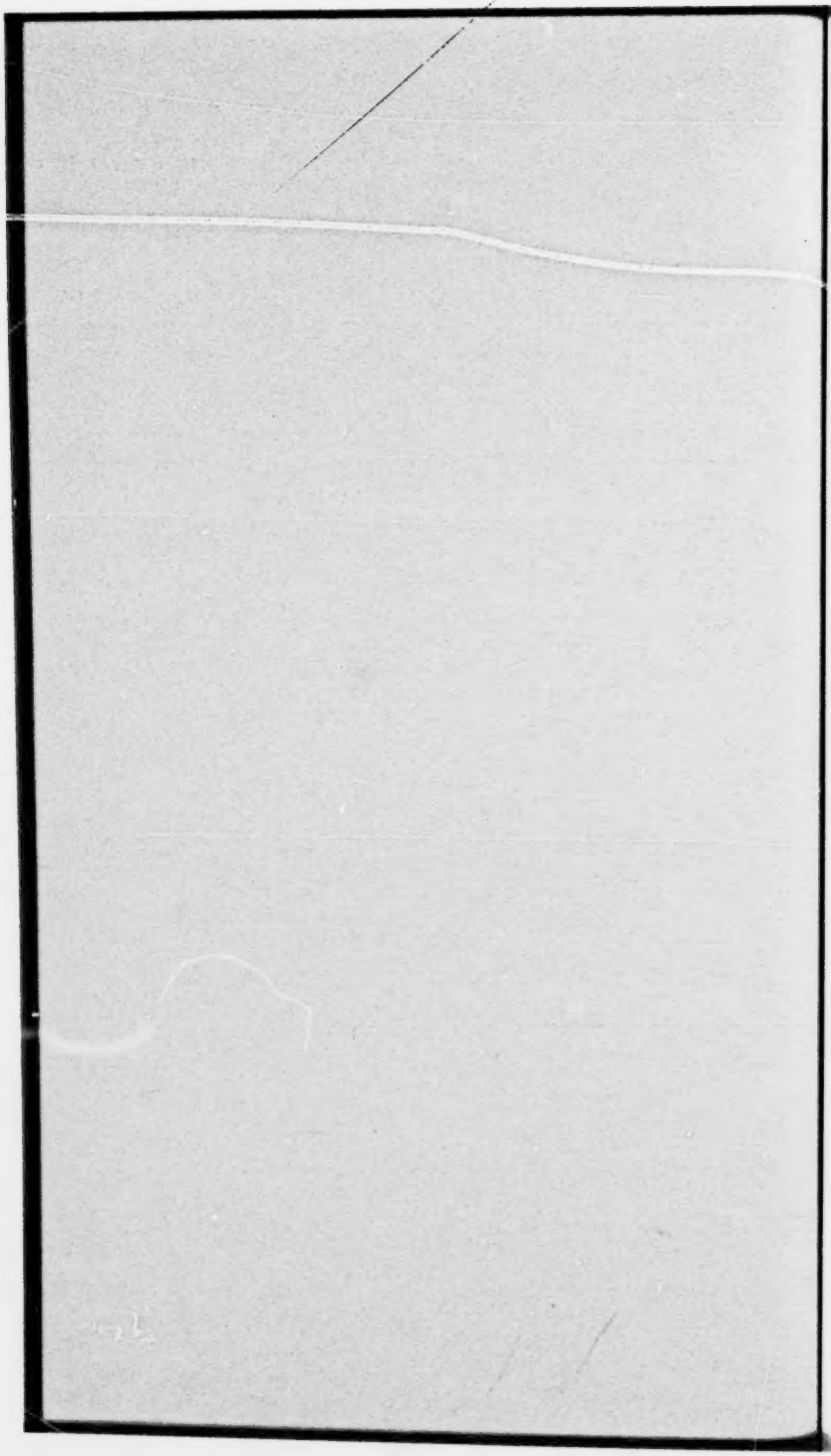
DUNNE, PHELPS & MILLS

By Louis L. Phelps
Attorneys for Respondent



California Code of Civil Procedure § 1048
In Effect Prior to July 1, 1972

§ 1048. Severance and consolidation of action.

An action may be severed and actions may be consolidated, in the discretion of the court, whenever it can be done without prejudice to a substantial right.

EXHIBIT A

California Evidence Code § 354

§ 354. Effect of erroneous exclusion of evidence.

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:

(a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the question asked, an offer of proof, or by any other means;

(b) The rulings of the court made compliance with subdivision (a) futile; or

(c) The evidence was sought by questions asked during cross-examination or recross-examination.

EXHIBIT B

California Evidence Code § 780(k)

§ 780. General rule as to credibility.

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

* * * (k) His admission of untruthfulness.

EXHIBIT C

CERTIFICATE OF SERVICE

I certify that I am one of the counsel for Respondent in the above-entitled and numbered matter and that I served three copies of the foregoing brief in opposition upon counsel for Petitioner by mailing the same to him by first class mail, postage prepaid, this 31st day of January, 1975, as follows:

Donald M. Sea, Esq.
1212 Broadway
Oakland, California 94612

JAMES O. ABRAMS

James O. Abrams